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have not been complied with, it is held that there must be some independent proof of an actual and voluntary consent, indicating the existence of a deliberately recognised marriage. And positive evidence of non-assent is of weight against an irregular ceremony. *Kopke v. People*, 43 Mich. 45 (1880).

8. That a marriage entered into through duress is void, but not when fear arises from an arrest and prosecution for bastardy. *Williams v. State*, 44 Ala. 24; *Honnett v. Honnett*, 33 Ark. 156. See *Willard v. Willard*, 6 Baxter (Tenn.) 298.

9. That there is nothing in the Constitution of the United States which prevents the states from declaring all miscegenetic marriages void. *State v. Hairston*, 63 N. C. 451; *State v. Reinhard*, 63 Id. 547; *Kinney v. Commonwealth*,

30 Gratt. 858; *Green v. State*, 58 Ala. 190.

We shall conclude this note with the following quotation from Story's Conf. of Laws, p. 178 (7th ed.): "If the incapacity of the parties is such that no marriage could be solemnized between them, * * * and without changing their domicile they go into some other country where no such limitation or restriction exists, and there enter into the formal relation with a view to return and dwell in the country in which such marriage is prohibited by positive law, it is but proper to say, that a proper self-respect (of the state or government in prohibiting such a marriage) would seem to require that the attempted evasion would not be allowed to prevail."

HENRY WADE ROGERS.

Supreme Court of Pennsylvania.

WIREBACH'S EXECUTOR v. FIRST NATIONAL BANK OF EASTON.

A lunatic who is an accommodation endorser without consideration upon a promissory note, and who has derived no advantage from his endorsement, either to himself or his estate, is not liable to a *bona fide* holder, although the latter had no knowledge of the lunacy.

Error to the Common Pleas of Northampton county.

Assumpsit against the executor of Wirebach, upon a promissory note drawn by one Christman to the order of Wirebach, and endorsed by the latter. Plea, non assumpsit.

Upon the trial the following facts appeared: In January 1876, Wirebach endorsed a note of \$4000 jointly with Richards and Christman for the accommodation of Stocker & Co., a firm doing business in South Easton, which note was discounted by the First National Bank of Easton. Besides this note of \$4000, the bank held at the time ten other notes of Stocker & Co., upon which Wirebach was not an endorser, but upon which Richards and Christman were endorsers, and these notes were carried along from time to time in different amounts, and maturing at different dates. In the beginning of December 1876, after one of the notes fell due and went to protest, Christman had an interview with the

president of the bank. It was then arranged that the said notes, eleven in number, should be replaced by one note, and that Christman should procure Wirebach to become endorser on the said note, and that Richards and Christman should be the drawers. Stocker & Co. were not to be parties to the new note.

In pursuance of this agreement, Christman, on December 7th 1876, met Wirebach by appointment, and went with him to the bank, where, in the presence of the president, who had prepared a calculation of the total amount of the eleven notes, the note in suit was duly executed for \$10,075.

The defendant set up that both before and at the time of the execution of the original note and the renewal, Wirebach was unsound in mind and incapable of contracting, and that the bargain was unconscionable, and had been obtained by undue influence and fraud. The testimony as to the insanity of Wirebach was conflicting, but there was no direct testimony on the part of the defendant that the officers of the bank knew of Wirebach's condition, except in so far as they might have inferred it from his actions while the transaction was being carried on.

Verdict and judgment for the plaintiff. The defendant took this writ.

Edward J. Fox (*W. S. Kirkpatrick* with him), for the plaintiff in error, cited, *Mitchell v. Kingman*, 5 Pick. 431; *Taylor v. Dudley*, 5 Dana 310; *Thornton v. Appleton*, 29 Maine 298; *Webster v. Woodford*, 3 Day 100; *Grant v. Thompson*, 4 Conn. 204; *Morris v. Clay*, 8 Jones 216; *Lazell v. Pinnick & Matson*, 1 Tyler 247; *Seaver v. Phelps*, 11 Pick. 304; *Bank v. Moore*, 28 P. F. Smith 407.

W. W. Schuyler (*William Mutchler* with him), for the defendant in error, cited, *La Rue v. Gilkyson*, 4 Barr 375; *Beals v. See*, 10 Id. 56; *Bank v. Moore*, 28 P. F. Smith 407; *Molton v. Camroux*, 2 Exch. 487; *Elliot v. Ince*, 7 DeG., M. & G. 487; *Wilder v. Weakley*, 34 Ind. 181; Benjamin on Sales, sect. 29, 1 Am. Ed.

The opinion of the court was delivered by

TRUNKY, J.—Where a person fairly and in good faith sells property, or loans money to a lunatic who appears to be sane and

is not known by the vendor or lender to be insane, and who has not been found to be a lunatic by judicial proceedings, and the lunatic receives and uses the same, whereby the contract becomes so far executed that the parties cannot be placed in *statu quo*, such a contract cannot afterwards be set aside, or payment refused by the lunatic or his representatives: (*La Rue v. Gilkyson*, 4 Barr 375; *Beals v. See*, 10 Id. 56; *Lancaster County Bank v. Mocre*, 28 P. F. Smith 407; *Wilder v. Weakley*, 34 Ind. 181; *Elliott v. Ince*, 7 De G., M. & G. 475, 487). In *Elliott v. Ince* it is remarked that "the result of the authorities seems to be that dealings of sale and purchase by a person apparently sane, though subsequently found to be insane, will not be set aside against those who have dealt with him on the faith of his being a person of competent understanding." Chief Justice GIBSON based the lunatic's liability in such cases on the principle that where a loss must be borne by one of two innocent persons it shall be borne by him who occasioned it; he is liable to bear the consequences of his infirmity, as he is liable to bear his misfortunes.

There can be no binding executory agreement where one of the parties is bereft of reason—a capacity to contract is absolutely necessary. An insane person is incapable of committing a crime or making a contract, yet it is common to speak of his torts and his contracts, and on many of them he is liable in a civil action. One who knowingly sells goods to an insane person, necessary for his use, may recover their value on the same principle that an infant is liable for necessities he purchases. His liability for necessities and suitable articles is deemed rather a benefit than a disadvantage to him.

It is noticeable that in this Commonwealth, where the lunatic has been held liable, there was neither imposition nor want of full consideration for the amount of liability, and when not for necessities, the opposite party had no knowledge of the lunacy. Thus, in *Lancaster County Bank v. Moore*, *supra*, stress was put on the fact that the bank had no knowledge of Moore's insanity, and in good faith loaned the money which was placed to his credit and checked out by him. It was held to be within the doctrine of *Beals v. See*, that the contract was executed so far as the consideration was concerned, and that the rule which prevents insane persons obtaining the property of innocent parties and retaining both property and price, required payment of the note: *Snyder v.*

Laubach, 7 W. N. C. 464, is where York's endorsement of the note was merely a renewal of an endorsement made when he was unquestionably of sound mind; and it was held that as he was clearly liable on the note of which the note in suit was a renewal, there was full consideration, and the case was within the decision in *Lancaster County Bank v. Moore*. The consideration was a debt for the amount of the renewal note. So in *Kneedler's Appeal*, 37 Leg. Int. 504, a judgment entered on a bond by virtue of a warrant of attorney was allowed to stand because the lunatic, acting by advice of counsel, received the full consideration which he prudently applied in payment of his undisputed debts, and the plaintiff had no knowledge of the insanity when the money was loaned. Of like purport are every one of the cases decided elsewhere, which are cited and relied on by the defendant in error. In most if not all cases where an insane person has been held answerable as if his contract were binding, he received and enjoyed an actual benefit from the contract.

The question now presented is: Will an action lie on the accommodation endorsement of a promissory note by a lunatic? If the determination of this was not made, it was very clearly indicated in *Moore v. Hershey*, 9 Norris 196. There the action was by an endorsee against the maker of a promissory note, and evidence was offered to prove that the maker had received no consideration for the note, which fact the plaintiff had admitted in conversation, proof having been made that the maker was insane, but the offer was rejected, the court below ruling that as the note in suit was commercial paper and the plaintiff a holder for value, the consideration could not be inquired into. This was held to be error. PAXSON, J., said, "We place our ruling upon the broad ground that the principle of commercial law above referred to does not apply to commercial paper made by madmen. * * * The true rule applicable to such cases is, that while the purchaser of a promissory note is not bound to inquire into its consideration, he is affected by the *status* of the maker, as in the case of a married woman or a minor. In neither of these cases can he recover against the maker. In the case of a lunatic, however, he may recover, provided he had no knowledge of the lunacy, and the note was obtained without fraud and upon a proper consideration."

"There must be a limit to the civil responsibility of persons of

unsound mind, otherwise their property would be at the mercy of unscrupulous and designing men."

If the holder could recover against one who was insane when he endorsed or made the note without consideration therefor, no wider door could be opened for the swindler to despoil such helpless persons of their estates. An infant who makes or endorses a note may, by his representative, plead his infancy as a complete defence. In like manner, a lunatic may plead insanity and want of consideration. The consideration respects himself, not the holder, who may have given value to his endorser. If the fact that the holder had paid value were enough, the lunatic could not defend for fraud upon him or for want of consideration. Then an innocent holder could recover, though the judgment would sweep away the lunatic's entire estate, and he had not been benefited a farthing. Nor would a nominal sum be sufficient. It is said that the law protects those who cannot protect themselves; but it would be sorry protection if one holding a valid note against a helpless man for \$4000 could get it renewed for \$10,000, and recover the full amount of the renewal-note. The consideration must be fair and conscionable, and then it is proper. When it is a pre-existing debt, or money loaned, its measure is certain; and the insane man is liable for no more than the amount of such debt or loan. The holder of a madman's note stands in no better position than the payee. An accommodation maker or endorser, in fact, is a surety for the principal debtor; and, when he is an infant or insane person, he or his representative may defend as in other forms of contract. We are not persuaded that commercial or public interests require an adjudication that a lunatic who signs a contract as surety, or as accommodation maker or endorser, is liable for the debt of another man.

This action is upon a note for \$10,075.92, which was given to the bank to take up notes of Stocker & Co., which were endorsed by Richards and Christman. J. C. Wirebach was accommodation endorser, and this was known to the bank. He was an endorser on one of the former notes for \$4000. It is alleged by the defence that Wirebach was incapable of making a contract by reason of insanity, not only at the date of the note in suit, but also at the date of said former note. If this fact were established the verdict should have been for defendant. And if he were sane when he endorsed the prior note, and insane at the time he endorsed the

note in suit, he is not liable for the one in suit, as it is not a mere renewal-note. The learned judge of the Common Pleas instructed the jury that, "to entitle the defendant to a verdict in this case, he must establish by satisfactory evidence that Wirebach was of unsound mind on the 7th of December 1876, and that the bank had notice or knowledge of such unsoundness." We are of opinion that it was error to rule that the defence failed, unless the bank had such notice or knowledge. This ruling pervaded the charge and answers to points of defendant; there is no occasion for special remark on each of the first nine specifications of error. We are not satisfied that the court erred in charging that there was no evidence of fraud, misrepresentation or undue influence on the part of the bank, or of fraudulent practices by Christman or Wirebach, to authorize submission of these questions. Fraud is not to be presumed from the mere fact of endorsement, even by a man feeble in mind and body. It is common for one friend, though possessed of strong mind, to ruin himself financially by endorsing for another; and while it is very imprudent, if not rash, it has never been considered unconscionable, except when procured by some artifice or fraud, of which there must be some evidence. Were the endorser weak-minded, less evidence would be required to establish the fraud.

None of the assignments relative to the offers of testimony by the defendant are sustained. One is to the effect that the defendant was prevented from proving by Mr. Scott that Wirebach was a shrewd, intelligent business man prior to 1875. Why the court overruled the direct question is not stated, but the witness was properly examined, and testified that Wirebach's manner of conversation was good, that he was a fluent talker, intelligent, had a good memory and was an intelligent business man. All of the witnesses were allowed to testify, so far as they knew, as to his appearance, manner, conversation and acts, before and after the commencement of his alleged unsoundness of mind. Nor do we think that the insolvency of Richards and Christman, or the value of Wirebach's property at the date of the endorsement, or that Wirebach once took an interest in, and was well informed on political matters, were facts so strictly pertinent that it was error to reject them. The admissibility of such facts depends much on other testimony in the cause, and most generally safely rests in the judgment of the court where the cause is tried.

The learned judge seems to have carefully considered his rulings, and to have fairly submitted to the jury to determine as to the alleged insanity of Wirebach at the time of the endorsement. But for the single error relative to notice to or knowledge by the bank of the insanity of Wirebach, the case must go back for another trial.

Judgment reversed, and *venire facias de novo* awarded.

The doctrine that a contract entirely executory on both sides cannot be enforced against an insane person, is too well settled to need any citation of authorities. (See the cases collected in Ewell's Leading Cases on Disabilities, 525.)

As to contracts wholly or in part executed, there is, however, some difference of opinion among the authorities. In *Seaver v. Phelps*, 11 Pick. 304; s. c., Ewell's Lead. Cas. 610, decided in 1831, which was trover for a promissory note pledged to the defendant by the plaintiff while he was insane, although it did not appear that the contract to secure the performance of which the pledge was made was an executed one, the distinction between executed and executory contracts was not regarded by the court as at all material, and it was held that it was not a legal defence that the defendant, at the time he took the pledge, was not apprised of the plaintiff's being insane, and had no reason to suspect it, and did not overreach him nor practice any fraud or unfairness. See, also, *Gibson v. Soper*, 6 Gray 279; *Bond v. Bond*, 7 Allen 1; *Henry v. Fine*, 23 Ark. 417; *Somers v. Pumphrey*, 24 Ind. 238; *Chew v. Bank of Baltimore*, 14 Md. 318; *Hovey v. Hobson*, 53 Me. 453; *Fitzgerald v. Reed*, 17 Miss. 94. Were the point not settled by authority, it would seem difficult, on principle merely, to answer the position taken in *Seaver v. Phelps*, that "the fairness of the defendant's conduct cannot supply the plaintiff's want of capacity," except, perhaps, in the case of contracts for necessities, which stand

upon a different ground. The first proposition of the court in the principal case, however, is supported by the clear weight of authority, both English and American. Besides the case of *La Rue v. Gilkyson* and the other cases cited by the court, see to the same point the leading case of *Molton v. Camroux*, 2 Exch. 487; s. c., affirmed in 4 Exch. 17, decided in 1848; *Beavan v. McDonnell*, 9 Exch. 309; s. c., 10 Id. 184; *Campbell v. Hooper*, 3 Sm. & G. 153; *Hassard v. Smith*, 6 Ir. Eq. Rep. 429; *Young v. Stevens*, 48 N. H. 133; *Behrens v. McKenzie*, 23 Iowa 343; *Fitzhugh v. Wilcox*, 12 Barb. 237; *Person v. Warren*, 14 Id. 488; *Yauger v. Skinner*, 14 N. J. Eq. 389; *Ballard v. McKenna*, 4 Rich. Eq. 358; *Sims v. McLure*, 8 Id. 286; *Matthiessen & W. Refining Co. v. McMahon*, 38 N. J. Law 537; *McCormick v. Littler*, 85 Ill. 62; *Scanlan v. Cobb*, Id. 299. See, also, *Lincoln v. Buckmaster*, 32 Vt. 658; *Long v. Long*, 9 Md. 348.

In *Molton v. Camroux*, the lunatic purchased certain annuities for his life of a society which, at the time, had no knowledge of his unsoundness of mind, the transaction being in the ordinary course of the affairs of human life, and fair and *bona fide* on the part of the society, and it was held that, after the death of the lunatic, his personal representatives could not recover back the premiums paid for the annuities.

In *Campbell v. Hooper*, the principle of *Molton v. Camroux* was applied to a bill for the foreclosure of a mortgage as against the real and personal representatives of a mortgagor who was a lunatic

at the time of the execution of the mortgage, it appearing that the money, to secure the repayment of which the mortgage was executed, was honestly paid, and that no advantage was taken by the mortgagee, and that he had no knowledge of the lunacy when he paid the money.

In *Behrens McKenzie*, defendant was held liable on an injunction bond executed by him while insane, the enjoyment of the benefit of the writ being the consideration enjoyed by him.

The limitations upon the doctrine stated at the outset in the principal case, that, in order to hold the lunatic liable, there must have been neither imposition nor want of full consideration for the amount of liability, and that, when not for necessities, the opposite party must have had no knowledge of the lunacy, are supported alike by reason and authority. The cases all seem to concede that, except in the case of necessities, the protection of the law is not to be extended to one knowing the insanity of the party with whom he is contracting. See *Henry v. Fine*, 23 Ark. 420. And it is sufficient notice where the circumstances known in regard to the other's mental condition were such as to convince a reasonable and prudent man of his insanity, or even to put him on inquiry by which he might, if reasonably prudent, have learned the fact: *Lincoln v. Buckmaster*, 32 Vt. 658.

It is generally considered that an adjudication of insanity is sufficient to avoid subsequent contracts. In *McCormick v. Littler*, 85 Ill. 62, however, it was held that, although a person may have been adjudged insane, yet, if no conservator has been appointed, and he is in the management of his business, and there is nothing about his appearance to indicate his incapacity to contract, if he purchases an article necessary and useful in his business, at a fair

and reasonable price, the seller having no notice of his having been adjudged insane, he will be liable to pay the price he agreed to pay.

The limitation upon the rule in *Molton v. Camroux*, laid down in the principal case, that the consideration must be full, fair and conscionable, and the decision arrived at in applying the law to the facts of the principal case place the law upon this subject upon a satisfactory basis. Although the rule in *Seaver v. Phelps*, as a matter of mere principle, seems well founded, unquestionably as a matter of policy and justice the rule in *Molton v. Camroux* works out more satisfactory and just results. If a lunatic could be held liable upon an accommodation endorsement, even though in the hands of a *bona fide* holder, the protection which it is the object of the law to extend to this unfortunate class of persons would amount to nothing. The rule of *Molton v. Camroux*, as to executed contracts, with the above limitations, affords all the protection that can safely be extended to persons dealing with lunatics, without practically abolishing the disability itself; and the principal case is important as being probably the first that clearly lays down and applies this salutary limitation. In *Van Patton v. Beals*, 46 Iowa 62, it was held that an insane person who signs as surety a note given for an antecedent debt, cannot be held liable thereon, even though the person taking the note had no knowledge of the incapacity of the surety. In that case, however, *Seaver v. Phelps* is cited with approval, and no case has been found, other than *Moore v. Hershey*, cited in the principal case, which discusses the question there involved. Altogether, the decision is a satisfactory one, and will doubtless become a leading case in this branch of the law. MARSHALL D. EWELL.

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